No. 87 751

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether an employee of the National Security Agency who fails to maintain a required clearance for access to classified information may be dismissed "for cause," without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833.

PARTIES TO THE PROCEEDING

Petitioners are Caspar Weinberger, Secretary of Defense, and Lt. General William E. Odom, Director of the National Security Agency (NSA). Respondent is a former employee of NSA. Respondent sued as John Doe in order to protect his employment status with NSA and because the "private and personal subject matter of this suit" might jeopardize his employment opportunities outside NSA (Plaintiff's Mot. for Leave to File as John Doe ¶¶ 2-3).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the Director of the National Security Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 820 F.2d 1275. The opinion of the district court (App., *infra*, 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a-23a) was entered on June 9, 1987. A petition for rehearing with suggestion for rehearing en banc was denied on August 18, 1987 (App., *infra*, 24a-25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions, 5 U.S.C. 7312, 7511-7513, and 7532, and relevant portions of the

National Security Agency Act of 1959, 50 U.S.C. 402 note, the Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*, and Chapter 370 of National Security Agency Personnel Management Manual 30-2 (Aug. 12, 1980) are set forth in App., *infra*, 26a-43a.

STATEMENT

Respondent was removed "for cause" from his position with the National Security Agency (NSA or the Agency) after it was determined that his access to classified information was no longer "clearly consistent with the national security." See 50 U.S.C. 831. The court of appeals held that the Director of NSA has no authority to remove an employee for cause where the cause for the removal is related to national security. Rather, the court held, an NSA employee may be removed on national security grounds only by the Secretary of Defense acting in person, under either 5 U.S.C. 7532 or 50 U.S.C. 833(a). The court of appeals ruled that the National Security Agency Act of 1959, 50 U.S.C. 402 note, which gives the Secretary of Defense or his designee the power to establish positions in the Agency and make appointments thereto without regard to the civil service laws, and 50 U.S.C. 831 and 832, which prohibit employment of any person at the Agency in a position involving access to classified information unless such access is "clearly consistent with the national security," do not authorize the removal for cause of an employee who fails to maintain his eligibility for such access.

The court of appeals' decision conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), cert. granted, No. 86-1552 (May 26, 1987), which held that a competitive service employee denied a security clearance required by his job could be removed for cause under the general removal provisions of the Civil Service Reform Act of 1978 (CSRA), Pub. L.

No. 95-454, 92 Stat. 1111, without invocation of 5 U.S.C. 7532. The Court granted certiorari in that case to decide whether, in the course of reviewing such a removal, the Merit Systems Protection Board (MSPB) is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance. The question presented to this Court in *Egan* arose only because the Federal Circuit decided the logically prior question—whether the Navy could remove Egan "for cause" without invoking Section 7532—in a way that conflicts with the later decision of the D.C. Circuit in the present case.

Briefs in chief have been filed in *Egan* and the case has been scheduled for argument on December 2, 1987. Accordingly, although the removal for cause issue has not been joined in *Egan*,[1] the Court may wish to defer consideration of this petition pending the Court's decision in *Egan*.[2]

A. THE STATUTORY AND REGULATORY FRAMEWORK

1. The National Security Agency was established by Presidential Directive in 1952 as a separately organized intelligence agency within the Department of Defense. The

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[1] Respondent Egan concedes that the Navy had authority to dismiss him for cause without invoking Section 7532. See Resp. Br. at 15, *Department of the Navy* v. *Egan*, cert. granted, No. 86-1552 (May 26, 1987). We have furnished respondent with a copy of our brief in *Egan*. We have also furnished counsel in that case with a copy of the instant petition.

[2] The mandate of the court of appeals in this case has been stayed pending the filing of this petition. The mandate does not direct reinstatement of respondent but would require the district court to remand the case to the Agency for proceedings pursuant to 5 U.S.C. 7532. If, upon such remand, the Secretary of Defense were to suspend and then remove respondent under that section, respondent would presumably be entitled to back pay from the date of the removal challenged in this case to the date of the suspension under that section.

National Security Agency Act of 1959, 50 U.S.C. 402 note (the 1959 NSA Act), gave the Secretary of Defense, or his designee, the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency." In DoD Directive No. 5100.23 (May 17, 1967) (C.A. App. 56-58), the Secretary of Defense delegated his authority under the 1959 NSA Act to the Director of NSA. The Director has in turn promulgated regulations governing personnel matters. NSA Personnel Management Manual 30-2 (Aug. 12, 1980) (NSA/PMM). Chapter 370 of these regulations (App., *infra*, 36a-43a) sets forth the standards and procedures for removing an employee.

Chapter 370 provides, inter alia, that an employee may be removed for "such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4). This overall standard for removal of an NSA employee is identical to that for federal employees who are covered by the CSRA (see 5 U.S.C. 7512-7513). NSA employees also enjoy by regulation many of the same procedural protections afforded federal employees covered by the CSRA, including the right to advance written notice of an adverse action, an opportunity to respond and be represented by counsel, and a written decision (compare 5 U.S.C. 7513 with NSA/PMM §§ 370.3-5 to 370.3-7). Preference eligible veterans employed at NSA, like preference eligible excepted service employees who are covered by 5 U.S.C. Chapter 75 (see 5 U.S.C. 7511(a)(1)(B)), have the right to appeal an adverse action to the MSPB (NSA/PMM § 370.3-8a(1)). Nonveterans at NSA, however, may not appeal adverse actions to the MSPB (*id.* § 370.3-8a(2)), just as nonveterans in the excepted service have no right of MSPB appeal under the CSRA (see 5 U.S.C. 7501(1)).

2. Because of the sensitive nature of the tasks performed by NSA, the Secretary of Defense is statutorily

directed to ensure that no person is employed by the Agency, or granted consequent access to classified information, unless such employment or access is "clearly consistent with national security" (50 U.S.C. 831). In particular, subject to specified exceptions, no person may be employed "unless he has been the subject of a full field investigation" (50 U.S.C. 832(a)). Subsection (b) of the same section provides for boards of appraisal to aid the Secretary and the Director of NSA in making access determinations, and further provides that "[n]o person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment * * * is in the national interest" (50 U.S.C. 832(b)).

All employees at NSA are required to be cleared for access to Sensitive Compartmented Information (SCI), which includes "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984), *reprinted in* App., *infra*, 44a-51a.[3] The standards and criteria for access to SCI are "more rigorous and stringent" than those for a top secret clearance, and individuals who have been granted top secret clearances may nonetheless be denied access to SCI (*id.* at 48a).[4]

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[3] Clearance for access to SCI is a statutory requirement of employment at NSA, except that conditional employment without such access may be granted pending completion of a full field investigation. See 50 U.S.C. 832(a) (requiring clearance for "access to sensitive cryptologic information or material").

[4] "Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, * * * a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used" (App., *infra*, 50a-51a).

3. The Secretary of Defense, like the heads of other agencies, has the power to suspend and thereafter to remove any employee when he determines that such action is necessary or advisable in the interests of national security. Section 7532 of Title 5, United States Code, provides that "the head of an agency" may summarily suspend an employee without pay when he considers such action "necessary in the interests of national security" and may remove a suspended employee when, after following specified procedures, he determines that removal is "necessary or advisable in the interests of national security." 5 U.S.C. 7532(a) and (b).[5] With certain exceptions, an employee suspended under this section is entitled to notice of the reasons for the suspension and an opportunity to respond, a hearing "by an agency authority duly constituted for this purpose," and a written decision. Neither a suspension nor a removal under Section 7532 is subject to any outside review. *Cole* v. *Young*, 351 U.S. 536, 546 (1956). An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government prior

[5] 5 U.S.C. 7531 contains a list of specific agencies and departments to which Section 7532 applies, but also provides that Section 7532 will apply to any "such other agency * * * as the President designates in the best interests of national security." By Executive Order, the President has extended Section 7532 "to all other departments and agencies of the Government." Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.). However, this Court in *Cole* v. *Young*, 351 U.S. 536, 551 (1956), held that "a condition precedent to the exercise of th[is] dismissal authority is a determination by the agency head that the position occupied is one affected with the 'national security' "—a determination, the Court made clear (*id.* at 548 (footnote omitted)), that will only be possible in agencies with "a close and immediate concern with the defense of the Nation." Thus, Section 7532 in fact has no relevance to many government agencies.

to consultation with the Office of Personnel Management (OPM) (5 U.S.C. 7312).

Congress also gave the Secretary of Defense broad and unreviewable discretion to remove any NSA employee when he considers such action to be in the interest of the United States and determines that compliance with the removal procedures set forth in other provisions of law would not be consistent with national security. 50 U.S.C. 833(a). Section 833(a) provides:

> Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

B. PROCEEDINGS BELOW

1. Respondent was employed at NSA from 1968 to 1984 as a cryptographic material control technician (App. *infra*, 2a). In 1982 he disclosed to NSA officials that he had engaged in homosexual relations with unnamed individuals, including foreign nationals (*ibid.*). Respondent was subsequently notified, pursuant to NSA regulations, of his proposed removal from employment on the gound that his continued access to SCI was not clearly consistent with the interests of national security (C.A. App. 83). The notice advised respondent that he had a right to respond, to be represented by counsel, and to review the information upon which the Agency relied in reaching its decision (*id.* at 83-84). The notice also advised respondent that he would be retained in pay status during the adjudication process but that he would not be permitted access to SCI (*id.* at 84).

Through counsel, respondent offered to undergo a psychiatric evaluation to demonstrate that he did not pose a security risk (App., *infra*, 2a). The Agency agreed to the psychiatric evaluation (*id.* at 3a) and, in the meantime, convened a board of appraisal pursuant to 50 U.S.C. 832(b) to determine whether respondent's continued access to SCI was clearly consistent with the national security (App., *infra*, 3a). Based on a detailed report of the psychiatrist in response to questions from the board, the board ultimately concluded that respondent's continued access to SCI was not clearly consistent with the interests of national security (*ibid.*). The board recommended, however, that in view of respondent's satisfactory job performance the Agency assist him in finding employment outside NSA (*id.* at 3a-4a).

Respondent's counsel filed a lengthy brief (C.A. App. 121-144) together with summaries of interviews and letters from respondent's acquaintances attesting generally to his good character and trustworthiness (*id.* at 147-174, 183-190). Respondent and his counsel also had a hearing before the Director of NSA at which respondent challenged the decision to withdraw his access to SCI (*id.* at 191). Following consideration of all of respondent's submissions, the Director decided to revoke respondent's eligibility for access to SCI. Since such eligibility was a condition of respondent's job and all other jobs at the Agency, the Director, relying on the authority delegated to him under the 1959 NSA Act, ordered that respondent be removed. App., *infra*, 4a.

Respondent's counsel requested a pre-removal hearing pursuant to 5 U.S.C. 7532 (App., *infra*, 4a). This request was directed to the Secretary of Defense as well as to the Director of NSA (C.A. App. 216-219). Both NSA and the Department of Defense replied that respondent's removal was for "cause" pursuant to NSA regulations and was not pursuant to the Secretary's summary authority under

either 50 U.S.C. 833 or 5 U.S.C. 7532 (C.A. App. 220, 221). Respondent renewed his request for a Section 7532 hearing, and also contended that the appointment authority provided in the 1959 NSA Act, 50 U.S.C. 402 note, and delegated to the Director of NSA, did not include any authority to remove employees (C.A. App. 222, 223). The renewed request was denied (*id.* at 224, 225), and respondent's employment was terminated effective March 9, 1984 (*id.* at 226).

2. Respondent then filed this suit in the United States District Court for the District of Columbia contending that his removal violated various constitutional and statutory rights. He argued, inter alia, that the Director had no statutory authority to remove him under the 1959 NSA Act and that, unless the Director proceeded under NSA's special summary authority (50 U.S.C. 833), the only available statutory authority for removal was 5 U.S.C. 7532. He sought reinstatement to his job or a remand to the Agency for a full hearing at which he could challenge the decision to revoke his clearance for access to SCI.

The district court granted summary judgment for petitioners (App., *infra*, 17a-20a). The court held, inter alia, that respondent was properly removed "for cause" pursuant to the 1959 NSA Act and NSA's implementing regulations. The court concluded that the power to remove is inherent in the power to appoint, and that, although NSA could have elected to proceed under its summary authority in 50 U.S.C. 833, it was not required to do so. The court noted that NSA in fact provided respondent with greater procedural safeguards by proceeding under its "for cause" regulations than he would have received under 50 U.S.C. 833 (App., *infra*, 20a). The court concluded that NSA was similarly not required, simply because the removal implicated national security concerns, to utilize the summary procedures of 5 U.S.C. 7532 (App., *infra*, 20a).

3. The court of appeals reversed the district court's decision with respect to the applicability of 5 U.S.C. 7532

and vacated the remainder of the decision (App., *infra*, 1a-16a). The court held that, since respondent's removal was "in the interests of national security," the Secretary of Defense was required to proceed under 5 U.S.C. 7532 in removing respondent. The court reasoned that since Section 7532 predated the creation of NSA, any implied removal authority granted to NSA must be limited by Section 7532. The court of appeals stated (App., *infra*, 10a): "Whatever implicit firing authority may ordinarily be conferred by an explicit grant of hiring authority, in this case the 1959 [NSA] Act cannot override a congressional statute that expressly controls terminations in the interest of national security." The court noted that Congress had subsequently provided NSA with an explicit statutory removal authority (50 U.S.C. 833), but since NSA did not use that authority, the only means of removing respondent in the interests of national security was Section 7532. The court therefore remanded to the agency for compliance with Section 7532.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, that an employee who fails to maintain a required eligibility for access to classified information may not be dismissed for cause, but may only be dismissed by the head of his agency under 5 U.S.C. 7532 or other summary procedure, is important to all federal agencies concerned with national security. The court of appeals has seriously misconstrued both 5 U.S.C. 7532 and the set of statutes governing NSA employment and access to classified NSA information. Its decision also conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), cert. granted, No. 86-1552 (May 26, 1987).

1. In the 1959 NSA Act, 50 U.S.C. 402 note, Congress granted to the Secretary of Defense, who in turn delegated to the Director of NSA, the authority to administer and direct the operations of NSA, specifically including the power "to establish such positions and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency." As a general matter, the power to fire is, unless expressly circumscribed, inherent in the power to hire. The district court correctly so noted (App., *infra*, 20a), and this Court has so recognized for 150 years. *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Crenshaw* v. *United States*, 134 U.S. 99, 108 (1890); *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900); *Shurtleff* v. *United States*, 189 U.S. 311, 315 (1903); *De Castro* v. *Board of Comm'rs*, 322 U.S. 451, 462 (1944); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961); *Arnett* v. *Kennedy*, 416 U.S. 134, 148 (1974) (plurality opinion); *id.* at 181 (White, J., concurring in part and dissenting in part).[6]

Clearance for access to SCI is a continuing requirement for employment at NSA, and loss of that clearance plainly constitutes "cause" for removal.[7] Section 831 provides that "no person shall be employed in * * * the National Security Agency * * * *or continue to be so employed* * * *

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[6] NSA employees are not covered by the civil service laws. However, as noted above, the Director has promulgated regulations granting to NSA employees substantive and procedural rights similar to those enjoyed by their counterparts in the civil service. These include the right to be dismissed "only for such cause as will promote the efficiency of the service." NSA/PPM § 370.3-4.

[7] Loss of a required clearance is also cause for removal under the parallel provisions of the CSRA. *Egan* v. *Department of the Navy*, *supra*; *Hoska* v. *Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982). Cf. *Cole* v. *Young*, 351 U.S. at 543 (footnote omitted) ("[t]he general personnel laws * * * authorize dismissals 'for such cause as will promote the efficiency of the service,' and * * * a reasonable doubt as to an employee's loyalty was recognized as a 'cause' for dismissal under those procedures as early as 1942").

[or] have access to any classified information[ ] unless such employment * * * or access to classified information is clearly consistent with the national security" (emphasis added). Section 832(a) provides that "[n]o person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this subchapter."

Sections 831 and 832 authorize, and NSA's regulations establish, procedures by which it may be determined that an existing employee's access to SCI is no longer "clearly consistent with the national security"—with the consequence that the employee must be removed. Section 831 directs the Secretary to prescribe regulations "relating to continuing security procedures" sufficient to assure that an individual's "continue[d]" employment is clearly consistent with the national security. The Secretary promulgated such regulations and NSA followed them here. Section 832(b), which applies to continuing as well as initial clearance determinations,[8] provides that, "in those cases in which the Director of the Agency determines that there is a doubt whether [the employee's] access to that information would be clearly consistent with the national security," a board of appraisal "shall submit a report and recommendation on each such a case." Section 832(b) further provides that no person may be cleared for access to classified information "contrary to the recommendations of any

[8] Section 832(b) establishes procedures for "assist[ing] the Secretary and the Director of the Agency in carrying out their personnel security responsibilities," responsibilities which are defined in Section 831 to include ensuring that no employee at NSA shall "continue to be so employed" and have access to classified information unless such continued employment and access is "clearly consistent with the national security."

such board" unless the Secretary or his designee "shall make a determination in writing that such employment * * * or access to classified information is in the national interest."

2. Neither the language nor the history of 5 U.S.C. 7532 supports the court of appeals' conclusion that Section 7532 displaces the authority of the Director to remove an employee for cause for failure to maintain a clearance that is a requirement of his job. Section 7532 is plainly not an exclusive procedure but an extraordinary supplement to the usual methods of removing federal employees. Section 7532 gives each agency head responsible for protecting national security—here, the Secretary of Defense—certain summary suspension and removal powers when he has made an affirmative determination that such action is necessary or advisable in the interests of national security. Neither the interests of national security nor the interests of employees would be served by turning it into a mandatory substitute for normal removal procedures.

Congress enacted the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476) to give the heads of certain executive agencies the power to take immediate action when necessary to protect the national security. See, *e.g.*, S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950). See also H.R. Rep. 2264, 80th Cong., 2d Sess. 1 (1948). From the standpoint of both the agency head and the affected employee, it is a drastic remedy. The agency head must act personally and must make affirmative findings that a suspension is "necessary" and then that a removal is "necessary or advisable" in the interests of national security. But the employee may be suspended summarily, without process and without pay, and may be removed "after such investigation and review as [the agency head] considers necessary." Permanent employees are entitled, "after suspension and before removal," to notice of charges "as specific[] as security considerations permits," an opportunity to respond, and a hearing "by an

agency authority duly constituted for this purpose." 5 U.S.C. 7532. The statute provides that "[t]he determination of the head of the agency is final" (5 U.S.C. 7532(b)), *i.e.*, there is no outside review (*Cole* v. *Young*, 351 U.S. at 546). An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government prior to consultation with OPM (5 U.S.C. 7312).

Section 7532 was not intended to be used routinely, but only when there is an immediate and apparent risk to the national security. See H.R. Rep. 2330, 81st Cong., 2d Sess. 3 (1950). See also *Cole* v. *Young*, 351 U.S. at 546. The proponents of the statute gave assurances that it would be used sparingly and cautiously. See, *e.g.*, *Hearings on S. 1561 Before a Subcomm. of the Senate Comm. on Armed Services*, 80th Cong., 1st Sess. 2, 3 (1948) (statement of Mark Edwin Andrews, Assistant Secretary of the Navy: "It is our intention to utilize the provisions of this law only in the exceptional cases where no other speedy and sure method is available to protect the national security. * * * I wish to reemphasize that the Navy does not intend to use this summary-dismissal legislation * * * except in the most unusual cases.").

For these reasons, this Court noted in *Cole* v. *Young*, 351 U.S. at 543, that the summary removal authority granted to agency heads by the predecessor of Section 7532 is "not the only, nor even the primary, source of authority to dismiss Government employees." In *Cole*, the Court held that, "[i]n the absence of an immediate threat of harm to the 'national security,' " a removal based on doubts about an employee's loyalty should proceed not under Section 7532 but under "the normal dismissal procedures" (351 U.S. at 546). That is precisely what happened in this case, and the court of appeals erred in concluding that the possibility of summary termination under Section 7532 somehow precluded a "for cause" removal of respondent.[9]

3. The court of appeals' decision is simply irreconcilable with the statutory mandate that "no person shall be employed in" the Agency or have "access to any classified information" unless such employment or access is "clearly consistent with the national security" (50 U.S.C. 831). If the employee fails to meet that "clearly consistent" standard and hence is no longer permitted by statute to have access to classified information, the statute requires that his employment not continue (*ibid.*). Removal under Section 7532, by contrast, requires an affirmative finding that

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[9] That Congress intended to allow "for cause" removal on national security grounds is clear from the preamble to 50 U.S.C. 833, which grants the Secretary of Defense summary authority to dismiss an employee in the interest of the United States. Section 833 provides that the Secretary's authority may be exercised "[n]otwithstanding sections 7512 and 7532 of title 5." The reference to 5 U.S.C. 7512 is to the "for cause" dismissal protections of the CSRA, protections which have been afforded by regulation to NSA employees. The reference to both Section 7512 and Section 7532 clearly indicates that Congress assumed that removals for cause would continue to occur even in cases with national security implications. See also 50 U.S.C. 832(b) (authorizing boards of appraisal to submit reports and make recommendations on access to classified information, but providing that "appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law").

Section 833 requires a finding by the Secretary of Defense both that the action is "in the interest of the United States" and that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security" (50 U.S.C. 833(a)). The latter clause further demonstrates that 50 U.S.C. 833 does not displace the general authority of the Director to remove employees for cause, merely because the case implicates national security.

removal is "necessary or advisable in the interests of national security." That is a different standard: a determination to deny access to SCI, on the ground that it is no longer "clearly consistent with the national security," does not necessarily mean there is an immediate danger to national security sufficient to invoke Section 7532. It does, however, mean that the employee no longer satisfies a statutory condition of his employment.

4. The court of appeals apparently reasoned (App., *infra*, 12a-13a) that respondent would receive more protection under Section 7532 than in a "for cause" removal, and that therefore the former procedure must displace the latter. But the premise is wrong and the conclusion does not follow: respondent received greater protection under NSA regulations than he would have received had Section 7532 been invoked; and the fact that NSA employees are statutorily excluded from civil service protection does not turn Section 7532, a supplementary procedure applicable to a wide range of federal employees, into an exclusive means of removing NSA personnel.

Under NSA regulations, respondent could be removed only for cause and was entitled to written notice, an opportunity to respond and be represented by counsel, and a written decision. His case was reviewed, first, by a board of appraisal and then by the Director of NSA, who met with respondent and his counsel. Had respondent been a veteran, he would also have had a right to appeal to the MSPB (see p. 4, *supra*). Respondent was kept on pay status for a period of 16 months while his case was being considered. When the board of appraisal determined that respondent's access to SCI was no longer "clearly consistent with the national security," it nonetheless recommended that NSA endeavor to help respondent find employment elsewhere.[10] This treatment contrasts sharply

[10] Although all positions at NSA require SCI clearance, that is not true elsewhere in the Department of Defense or in other agencies.

with what respondent could have expected under Section 7532, which is designed primarily to deal with immediate threats to national security: summary suspension without pay, notice only to the extent consistent with national security, a single hearing of unspecified scope, and, if the determination were made to remove him, ineligibility for any other position in the Department of Defense or, prior to consultation with OPM, for appointment elsewhere in government. NSA employees would be ill-served if Section 7532 became the standard procedure for all removals based on considerations of national security.

In any event, the fact that NSA personnel have no civil service protection does not imply that Section 7532 is the exclusive means of removing them. Section 7532 applies to employees of many agencies (see n.5, *supra*), including employees in the competitive service, who do have civil service protection and who receive statutory protections in a "for cause" removal that they do not receive when Section 7532 is invoked.[11] The emergency procedure permitted by Section 7532 does not become a mandatory procedure just because personnel of a particularly sensitive agency have been deliberately shorn of statutory protection and relegated to such protections as the agency provides by regulation.

5. The court of appeals' ruling has an importance that extends well beyond NSA. The court ruled that a general

[11] For example, a competitive service employee or veteran removed for cause for failure to obtain or retain a required security clearance is entitled, under 5 U.S.C. 7513, to MSPB and judicial review in addition to agency procedures. See *Egan* v. *Department of the Navy*, *supra*. We argue in that case that the substance of the clearance determination is not reviewable, but this outside check on the procedures followed by the agency offers a protection wholly unavailable under Section 7532.

authority to remove employees for cause is displaced in cases involving national security by 5 U.S.C. 7532. The opinion suggests no reason why that ruling should not apply to other agencies with general "for cause" removal authority.[12] If it does, then every routine decision to revoke a required clearance would require procedures suitable to an immediate threat to national security, including the personal attention of the head of the agency. Even if the "necessary or advisable" standard of Section 7532 could be stretched to accommodate such cases (as would be necessary if the "clearly consistent" test of 50 U.S.C. 831 and other statutes is to be complied with), the burden upon the agencies and consequent inefficiency would greatly handicap efforts to protect the national security.[13]

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[12] The court of appeals did note that Section 7532 predates the NSA Act of 1959, but statutes are normally more easily read to displace prior enactments than subsequent ones.

[13] Two additional points should be noted. First, the line of distinction between dismissals implicating national security and those which "promote the efficiency of the service" in other ways is far from clear. For example, an employee found selling drugs could be dismissed for cause to promote the efficiency of the service. Yet drug trafficking is presumably also grounds for revoking a security clearance because the continued access to classified information by such an employee would seem not to be "clearly consistent with the interests of the national security." It is not clear whether the court of appeals' decision would require the agency to proceed under Section 7532 in such a case.

Second, mandatory resort to Section 7532 could cause some of the very security problems the section was designed to alleviate. In the above example, the Director might be legitimately concerned that suspension of the employee without pay (under Section 7532) would

Finally, the court of appeals' holding is in direct conflict with the conclusion of the Federal Circuit in *Egan* v. *Department of the Navy, supra*, that an agency may remove an employee for cause, for failure to hold a required security clearance, without invoking Section 7532. Although, as noted (see n.1, *supra*), issue is not joined in this Court on that question in *Egan*, the question was fully considered and expressly decided by the Federal Circuit, and it is the logical antecedent to the question presented by the petition in that case. If the Navy had no authority to dismiss Egan for cause after denying him a security clearance, then the question presented in *Egan*—the scope of MSPB review of the dismissal—would not have arisen.

We believe the Court should grant certiorari in this case and, after plenary review, reverse the decision below. However, briefs in chief have been filed in *Egan*, and argument has been scheduled for December 2, 1987. Under the circumstances, since the Federal Circuit's contrary view on the issue presented in this case is a predicate for the issue presented in *Egan*, the Court may wish to defer consideration of this petition pending the Court's decision in *Egan*.

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cause the employee to react by disclosing highly sensitive information in retaliation. By adjudicating the employee under the "for cause" procedures established by NSA regulations, with attendant procedural protections and the employee enjoying full pay but denied further access to classified information, the Agency may be able to defuse any such impulse. While the Agency does not dispute that it *could* proceed under Section 7532 in such a case, it vigorously disputes that it *must* do so, since a mandatory procedure undermines its ability to protect national security when it believes that the summary procedures might cause greater risk to national security than a for cause dismissal.

CONCLUSION

The petition for a writ of certiorari should be granted either now or after the Court's decision in *Department of the Navy* v. *Egan*, No. 86-1552.

Respectfully submitted.

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NOVEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Argued February 13, 1987
Decided June 9, 1987

Opinion for the Court filed by *Chief Judge* WALD.

Before: WALD, *Chief Judge,* BORK and SILBERMAN, *Circuit Judges.*

WALD, *Chief Judge*: Is an employee of the National Security Agency (NSA) entitled to a hearing under 5 U.S.C. § 7532 before being fired from his job even though a security clearance is a prerequisite for employment at the agency and the agency has revoked his clearance pursuant to statutory authority under 50 U.S.C. §§ 831-32? We hold that Congress did not intend its delegation of authority to revoke security clearances in one statute to negate the pre-termination hearing requirement contained in the other and that, accordingly, an employee has a right to administratively challenge the basis for his security clearance revocation in that pre-termination hearing.

I. FACTUAL BACKGROUND

The National Security Agency is part of the Department of Defense. Its functions include intercepting and analyzing the communications of foreign governments with the use of highly sophisticated technology. Because of its nature, the work conducted at NSA has been designated "Sensitive Compartmented Information," which is a level of classified information above "Top Secret."

Appellant was employed at NSA as a Cryptographic Material Control Technician. The duties of this position are not entirely clear to us. The government's definition is essentially tautological: "a Cryptographic Material Control Technician performs a variety of procedural functions concerned with the physical control and distribution of cryptologic material in accordance with Agency guidelines, policies, and regulations." Appellee's Brief at 7 n.10. At any rate, the relevant point is that an employee in this position has access to information designated as SCI. Appellant, therefore, had to attain a security clearance for access to this information in order to be employed at his job.

In March 1982, appellant voluntarily revealed to the NSA security officials that he had engaged in homosexual relations with several unknown individuals, presumably foreign nationals, during vacation travels abroad. Later on, he declared that in July 1982 he again had a homosexual liaison with an unknown individual while visiting the Dominican Republic. Based on these disclosures, the NSA Director referred the question of whether appellant should be allowed continued access to SCI to a "board of appraisal" as provided in 50 U.S.C. § 832(b).

In order to defend himself against the charge that he was psychologically unstable and therefore a security risk, appellant suggested to NSA officials that he voluntarily submit to psychiatric evaluation. The NSA officials agreed to an evaluation conducted by a psychiatrist selected by

the NSA. *See* Joint Appendix (J.A.) at 102. The psychiatrist concluded that appellant suffered from a case of "mixed anxiety and depression," characterized as "mild." *Id.* at 105 (emphasis omitted). The psychiatrist also stated that "[t]he reported . . . shallowness of most recent friendships and 'lack of friends' suggest difficulties with intimacy," but acknowledged that "[t]his diagnosis cannot be firmly established without more extensive clinical interviewing and psychological testing." *Id.* The psychiatrist noted that appellant's homosexuality "is not considered a mental disorder." *Id.*

The board of appraisal reviewing appellant's clearance requested additional information concerning appellant's emotional stability, judgmental maturity, loyalty, and "potential trustworthiness in relation to national security practices." *Id.* at 110. The psychiatrist responded without conducting any additional interviewing or testing. In his second report, the psychiatrist stated:

> In my opinion [appllant] [*sic*] is living in a state of precarious emotional balance . . . .
>
> . . .
>
> . . . I believe that anyone as emotionally starved as he is for relationships, will become more vulnerable to offers of friendship and more at risk of developing unwise attachments to individuals, than would be the case for a more mature and well-adjusted individual with satisfying interpersonal relationships.

Id. at 111-12.

The board of appraisal acknowledged that it relied heavily on the psychiatrist's second report in reaching its conclusion that appellant's access to SCI was "clearly inconsistent with the national security." *Id.* at 108. The board recommended to the Director that he terminate appellant's employment at NSA, but that in light of appellant's satisfactory job performance, the NSA assist him

in finding a new job outside the NSA. The board also stated that it "took note of information concerning [appellant's] admitted homosexual/bisexual preference, but did not judge it to be material in and of itself to the Board's decision." *Id.*

The Director of the NSA accepted the board's recommendation to terminate appellant's appointment at NSA:

> [Appellant's] attorneys argue that the Board of Appraisal seems to rely almost entirely on the 10 May 1983 [psychiatric] assessment which they assert is inconsistent and contradictory with his 12 February 1983 report which they further argue was favorable to their client. I would certainly concede the first report was less damaging (albeit not exactly favorable), but I consider the second report more valuable because it was better focused. Although the same interview data provided both evaluations, the second was in response to . . . specific questions which help [the psychiatrist] to orient his analysis. When he does so, he portrays a potentially unstable individual who is of concern to me irrespective of sexual preference.

Id. at 191-92. With respect to appellant's promiscuous homosexual acts, the Director stated: "Frankly, it is the indiscriminate pattern of activity which invites the risk of security exploitation rather than the specific homosexuality of it." *Id.* 192. The Director notified appellant of the decison to remove him on the grounds that appellant's access to SCI was "not clearly consistent with the national security." *Id.* at 193.

In response to this decision, appellant petitioned the Secretary of Defense arguing that he had a right to a hearing under 5 U.S.C. § 7532 before being removed from his NSA position. After the Secretary of Defense denied his petition, appellant brought this action in the District Court for the District of Columbia. In addition to claiming that the denial of a hearing contravened congressional

command, appellant argued that the government violated the constitutional requirement of procedural due process. The appellant also brought substantive challenges against the decision to revoke his security clearance and terminate his employment at NSA. Appellant complained that the decision was "arbitrary" and "capricious" and therefore must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). And notwithstanding the assertions of the board of appraisal and the Director to the contrary, appellant also claimed that their decisions were motivated by an unconstitutional prejudice against homosexuals.

The District Court granted the government's motion for summary judgment. The court stated that "even if the termination was premised solely on plaintiff's homosexuality, the agency's decision to withdraw plaintiff's access to SCI and thereafter terminate him is rationally related to a permissible purpose." J.A. at 34. The court also rejected appellant's other legal contentions. This appeal followed.

II. ANALYSIS OF THE RELEVANT STATUTORY SCHEME

Several statutes bear on the resolution of this case. First, in 1950 Congress passed a law regulating the removal of employees from certain federal agencies, including the Department of Defense, for reasons of "national security." Act of August 26, 1950, 64 Stat. 476. While the statute grants the head of the relevant agency (in our case, the Secretary of Defense) complete discretion to determine when such removal "is necessary or advisable in the interests of national security," it also affords employees certain pre-removal procedural protections, including an administrative hearing, and review by the agency head or a designee. This statute was subsequently reenacted, with amendments, as 5 U.S.C. § 7532 in the 1966 recodification of Title 5 of the United States Code. *See* Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 529.

Second, the National Security Agency Act of 1959, as amended, provides that "[t]he Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency." *See* Pub. L. No. 86-36, 73 Stat. 63 (codified, as amended, at 50 U.S.C. § 402 *note*). And third, in 1964 Congress enacted another statute specifically involving "Personnel Security Procedures in the National Security Agency." *See* Act of March 26, 1984, Pub. L. No. 58-290, 78 Stat. 168. This Act requires the Secretary of Defense to establish regulations

> relating to continuing security procedures . . . to assure—(1) that no person shall be employed in . . . the National Security Agency . . . or continue to be so employed . . . and (2) that no person so employed . . . shall have access to any classified information; unless such employment . . . or access to classified information is clearly consistent with the national security.

50 U.S.C. § 831. In cases of doubt boards of appraisal are authorized to recommend whether individuals should have access to classified information. *Id.* § 832(b). The Act also states:

> Notwithstanding section 7512 and 7532 of Title 5, or any other provision of law, the Secretary [of Defense] may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security.

50 U.S.C. § 833. Since the government in this case expressly disavows any reliance on the summary termination

authority in 50 U.S.C. § 833, appellant argues that he has a right to the procedural safeguards provided in 5 U.S.C. § 7352 before he is removed from his NSA position "in the interests of national security."

A. *Judicial Review of Appellant's Claim*

The first issue raised by appellant is whether § 7532 applies to this case, thereby granting him a right to a hearing prior to his removal from the NSA. Before addressing this issue, we pause briefly to note our authority to address this issue. We recognize that § 7532 states that "[t]he determination of the head of an agency is final." Although this provision precludes a court from reviewing the Secretary's judgment that "removal is necessary or advisable in the extent [*sic*] of national security," it does not preclude judicial review to the extent necessary to ensure that the Secretary, in fact, acts pursuant to the statute, including its procedural requirements. *See Cole v. Young,* 351 U.S. 536 (1956).

In this case the government relies in part on the 1964 Act to argue that appellant's dismissal does not require the procedures set forth in § 7532. We recognize that 50 U.S.C. § 835 states that the judicial review provisions of the APA "shall not apply to the use or exercise of any authority granted in [the 1964 Act]." Thus, *if* the government may properly rely on the 1964 Act to dismiss appellant without regard to 5 U.S.C. § 7532, § 835 seems to preclude any further judicial review of the agency's decision at issue in this case. Nevertheless, the basic question of whether the government may rely on the 1964 Act to bypass the § 7532 procedures remains subject to judicial resolution. *Cole* v. *Young* stands for the proposition that a reviewing court has authority to determine whether § 7532 does or does not apply to a particular dismissal. In sum, the government may not invoke the preclusion-of-judicial-review provision found in the 1964 statute, and applicable

only to agency action within the scope of that statute's delegation, to bar judicial review of the legal question whether another statute (namely 5 U.S.C. § 7532) governs the agency action in dispute.

We remain mindful, however, of the curtailment of judicial review contained in both 5 U.S.C. § 7532 and 50 U.S.C. § 835. The scope of our review in this case is very limited, indeed. We will decide only the question of whether appellant was entitled to the procedures specified in 5 U.S.C. § 7532, because the agency declined to invoke the authority of 50 U.S.C. § 833.

B. *The Applicability of the § 7532 Procedural Requirements*

By its own terms, § 7532 applies to appellant's dismissal. Appellant was an employee of an agency covered by the statute, the Department of Defense, of which NSA is a part. The agency's own justification for revoking appellant's security clearance and terminating his employment at NSA was "national security," within the meaning given that term by the Supreme Court. *See Cole* v. *Young, supra;* J.A. at 108, 192. Appellant held an "indefinite appointment" at NSA, had long since completed his probationary period, and is a United States citizen. 15 U.S.C. § 7532(c)(1)-(3).

The government, however, argues that the procedures of § 7532 are "neither mandatory nor exclusive," Brief of Appellees at 44, *i.e.*, that if an agency covered by § 7532 can properly rely on some other statutory authority to fire an employee and this alternative statutory authority allows the government to grant an employee less procedural protections than § 7532, then the agency need not abide by the procedures set forth in § 7532. This argument, however, appears to contradict the express language of the statute and its legislative history. Congress explicitly provided that § 7532 does not impair other pre-existing statutory authority for the dismissal for security reasons of one

specific agency, *i.e.*, the Atomic Energy Commission. *See* 5 U.S.C. § 7533. But Congress did not provide any equivalent provision for any other agency covered by § 7532. Indeed, the House Report states:

> Under the present law, with respect to [the Departments of State and Defense,] the officer or employee who is suspended or terminated as a security risk is not entitled as a matter of right to an appeal to the head of the agency concerned. This legislation extends this appeal right to employees [of these agencies.]

H.R. Rep. No. 2330, 81st Cong., 2d Sess. 3 (1950). This history, it seems to us, effectively shoots down the theory that § 7532 is only an extra option for agencies wishing to fire employees as national security risks.

But even if we accepted the government's theory, it still could not avoid the applicability of § 7532 to appellant's dismissal. The government would have to point to an alternative statutory authority that would allow the Secretary of Defense to bypass the § 7532 procedures. The two statutes which the government proffers for this purpose do not suffice. Both these statutes were enacted *after* the statute now codified as § 7532 and therefore cannot be considered to be part of a pre-existing termination authority that Congress did not wish to supplant. Furthermore, neither statute contains a provision of termination authority that renders § 7532 inapplicable to this case.

1. *The 1959 Act*

The National Security Agency Act of 1959 makes no mention of the removal of NSA employees. Yet the government contends that by authorizing the Secretary of Defense to hire NSA employees, the Act necessarily grants

him the counterpart authority to fire them. Further, according to the government's theory, because this implicit termination authority is uncurtailed by any procedural limitations, appellant has no statutory right to a hearing.

Whatever implicit firing authority may ordinarily be conferred by an explicit grant of hiring authority, in this case the 1959 Act cannot override a congressional statute that expressly controls terminations in the interests of national security. Were we to follow the government's train of logic, inferences to be drawn from the 1959 Act would render the explicit mandate of 5 U.S.C. § 7532 entirely nugatory with respect to NSA employees. The Secretary of Defense could rely on an inherent termination authority, whose contours are not delineated, indeed whose existence is not even acknowledged in any Act, to fire an NSA employee without any of the procedural restraints set out in § 7532, which includes NSA termination. The government's interpretation would effectively amount to a repeal of § 7532 by implication, something that courts are traditionally most reluctant to endorse. *See, e.g., FAIC Securities, Inc.* v. *United States,* 768 F.2d 352, 362 (D.C. Cir. 1985).

2. *The 1964 Act*

The government also contends that the § 7532 procedures are inapplicable to appellant's dismissal because he was removed from NSA employment pursuant to a rule that no person may be employed at NSA without a security clearance for access to SCI. The government points to the 1964 Act as statutory authority for this administrative rule. *See* Appellee's Brief at 4 & n.5. But even if we assume that the 1964 Act authorizes this rule, the government's effort to escape the § 7532 procedures must fail. As we will explain, the 1964 Act does not negate the applicability of § 7532 to decisions to remove individuals from NSA employment for national security reasons, except as pro-

vided in 50 U.S.C. § 833. Therefore, an administrative rule authorized by the 1964 Act (but not an application of § 833) cannot suspend the procedural requirements of § 7532.

The 1964 Act requires the Secretary of Defense to develop "continuing security procedures" to assure that no person employed at NSA has access to classified information or remains employed at NSA unless the access to classified information or employment is "clearly consistent" with national security. 50 U.S.C. § 831. But the procedures required by this statute for clearance revocation do not supersede the procedures specified in 5 U.S.C. § 7532 for termination. Section 831 appears to call for periodic checks designed to detect and thwart emerging security risks at NSA. Congress obviously did not intend to hamper such routine security checks by requiring any specific procedural prerequisites. But there is nothing in § 831 to suggest that if, as a result of such investigations, an NSA employee is faced with the loss of the job, the NSA may automatically bypass the administrative hearing laid down in § 7532.

In fact, the 1964 Act explicitly makes a distinction between the procedures governing security clearance decisions and the procedures governing employment terminations as provided in 5 U.S.C. § 7532. The section of the 1964 Act that establishes boards of appraisal to assist in security clearance decisions states that "appraisal by such a board is not required before action may be taken under section[] . . . 7532 . . . ." 50 U.S.C. § 832(b). Congress would not have needed to include such a provision if a decision to revoke an NSA employee's security clearance could result automatically in the termination of the individual's employment at NSA. This provision expresses congressional recognition that separate proceedings to revoke security clearance and terminate an employee's

employment may be overly time-consuming and repetitive. To allow the agency to expedite matters, Congress provided that the agency may bypass the clearance revocation proceedings and go straight to the removal proceedings under § 7532. Congress, however, did not allow the agency to revoke an employee's security clearance pursuant to § 832(b) and then subsequently dispense with the procedures for dismissing the employee under § 7532.

Indeed, the only section of the 1964 Act governing dismissals from NSA employment expressly indicates that § 7532 applies except in the most limited circumstances. This section states that "[n]otwithstanding section [] . . . 7532 of Title 5 . . . the Secretary may terminate the employment of any [NSA employee] whenever . . . he determines that the procedures prescribed [therein] cannot be invoked consistently with the national security." 50 U.S.C. § 833. By specifically mentioning 5 U.S.C. § 7532 in this way, 50 U.S.C. § 833 makes clear that the 1964 Act did not render § 7532 automatically inapplicable to the dismissal of NSA employees. Rather, the statute provides that § 7532 will continue to govern the removal of NSA employees *unless and until* the Secretary of Defense makes a determination in a given case that even the minimal § 7532 procedures are not consistent with national security.

Moreover, 50 U.S.C. § 833 confirms that the 1959 Act did not repeal by implication § 7532 with respect to NSA employees. Contrary to the government's assertion, the 1959 Act did not grant the Secretary of Defense an implicit authority to fire an NSA employee in the interest of national security summarily, without even the minimum hearing stipulated in § 7532. Rather, in 1964, Congress granted the Secretary the explicit authority to dispense with the § 7532 hearing, but only when national security requires such summary dismissals. The government's construction of the 1959 Act, in addition to rendering § 7532 entirely nugatory, would render § 833 entirely superfluous.

Thus, in enacting § 833, Congress made plain that neither the 1959 Act nor the 1964 Act by its own force suspends the procedural rights granted by § 7532. These procedures control the removal of individuals from NSA employment except in those limited circumstances when national security requires that even these procedures be eliminated. As the government acknowledges, in this case the Secretary has not found that a § 7532 hearing would itself contravene national security. Accordingly, appellant is entitled by law to that hearing.

C. *Hearing Options Available to the Secretary Under the Current Statutory Scheme*

We point out at this juncture that our holding will not necessarily require the agency to "relitigate" *de novo* in the § 7532 proceedings the same issues already decided by the NSA Director pursuant to 50 U.S.C. § 832 (b). We note as well that any duplication in process that does result is of the agency's own making. It has established an administrative rule mandating that revocation of SCI clearance automatically results in dismissal. But it has not availed itself of the means Congress expressly provided in § 832(b) for avoiding procedural duplication, through bypassing the security clearance revocation proceedings and going directly to the § 7532 proceedings for a determination of whether removal is necessary or advisable in the interests of national security.

In addition, even if the Secretary wishes to rely on the expertise of the boards of appraisal in making the initial clearance revocation decision, the Secretary could still avoid duplication of process by vesting the predetermination hearing authority in those same boards of appraisal. Section 7532 requires only that the hearing be conducted

"by an agency authority duly constituted for this purpose." The Secretary could then choose the NSA Director as his "designee" to review the board's termination conclusion under 5 U.S.C. § 7532, just as he has chosen the NSA Director as his designee for making security clearance decisions under § 832(b). *See* J.A. at 62. Under § 7532, the Secretary may not delegate his duty to make the final removal decision or his duty to supply the dismissed employee with a written statement of this decision. But since § 7532 would allow the Secretary to base his final decision on the review conducted by the NSA Director, one board of appraisal proceeding for making termination as well as clearance decisions would suffice. As long as the boards of appraisal conduct the hearing specified in § 7532 before they recommend that an employee be dismissed from NSA employment because of a lack of access to SCI, the Secretary would satisfy the congressional demand that the employee receive an administrative hearing and review to contest dismissal as a national security risk.

The Secretary of Defense, however, has chosen to keep termination proceedings under § 7532 separate from security clearance proceedings under § 832(b). He has not delegated the § 7532 hearing or review authority to the NSA Director or to NSA administrative bodies. *See* J.A. at 62, 230. While the Secretary is well within his authority to keep these proceedings separate, he cannot subsequently complain that their separation causes duplication and, on this basis, deny appellant his right to a § 7532 hearing. Once the Secretary has chosen, through the NSA Director, to institute a board of appraisal proceeding to assess appellant's continued access to SCI, but has not chosen to use the same board of appraisal to conduct the § 7532 hearing, the Secretary must grant appellant a separate § 7532 hearing, even at the risk of duplicating the earlier

proceedings. We leave to the Secretary the initial determination of what the precise scope of this hearing should be.

III. APPELLANT'S REMAINING CLAIMS: APPLICATION OF THE EXHAUSTION DOCTRINE

Since we hold that appellant has a right to a hearing under 5 U.S.C. § 7532, we need not address his other claims at this time. *See Vitarelli* v. *Seaton,* 359 U.S. 535, 540 (1959). The possibility always exists that in the course of this hearing the Secretary of Defense will reverse the earlier agency decision, and appellant must exhaust this administrative remedy before seeking further judicial review. Judicial reliance on the exhaustion doctrine is appropriate when a plaintiff raises a constitutional issue that may not have to be decided if relief is obtained in the administrative proceedings. *See Ticor Title Insurance Co.* v. *Federal Trade Commission,* 814 F.2d 731, 738-40 (D.C. Cir. 1987) (opinion of Edwards, J.).

The remaining claims raised by appellant in this case, including his constitutional claims, may also be subject to the argument that they are immune from judicial review by either § 7532 or § 855. *Cf. Department of Navy* v. *Egan,* 55 U.S.L.W. 3792 (1987), *granting cert. to* 802 F.2d 1563 (Fed. Cir. 1986) (question presented: whether Merit Systems Protection Board, in course of reviewing removal of employee for failure to maintain required security clearance, may review substance of underlying decision to revoke the clearance). Were we to consider these claims at this time, we would have to confront the thorny issue of whether statutes that explicitly curtail judicial review of certain administrative decisions were intended to preclude judicial review of constitutional claims; and should we find such an intent, the even pricklier question of whether this preclusion of judicial review was itself

constitutional. *See Bartlett* v. *Bowen,* No. 85-5233 (D.C. Cir. March 17, 1987), *vacated and rehearing en banc granted,* ____ F.2d ____ (June 5, 1987). These are certainly not issues that courts should decide when the exhaustion of administrative remedies may obviate the need for their resolution.

In this case, the District Court proceeded to decide appellant's claims without even considering whether or not a judicial determination of these claims was proper. Consequently, we vacate the decision of the District Court concerning appellant's remaining claims.

CONCLUSION

Because we hold that appellant is entitled to an administrative hearing under 5 U.S.C. § 7532, we reverse the contrary decision of the District Court. Because appellant must exhaust the § 7532 process before seeking further judicial review, we vacate the remainder of the District Court's decision, without expressing any opinion on the ultimate disposition of appellant's remaining statutory and constitutional claims. Finally, we remand this action to the District Court for an appropriate order directing the Secretary of Defense to act pursuant to 5 U.S.C. § 7532.

Reversed in part, vacated in part, and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1996

JOHN DOE, PLAINTIFF

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed Apr. 25, 1986]

MEMORANDUM

This lawsuit, brought by a former employee of the National Security Agency ("NSA"), challenges plaintiff's termination from employment with NSA. Plaintiff DOE was removed from his position at NSA effective March 9, 1984, because his access to classified information, a statutory condition of employment with NSA, was withdrawn. Plaintiff alleges that his statutory and constitutional rights were violated in withdrawing his access to classified information, and terminating his employment.

Specifically, plaintiff claims that the agency's reliance on plaintiff's own statements regarding his homosexual past was improperly used by NSA to withdraw his security clearance. Plaintiff further alleges that the statutory scheme utilized by NSA to terminate plaintiff was improper and that the agency was required to invoke the provisions of 5 U.S.C. § 7532 instead. The matter is before the Court on defendants' motion for judgment on the pleadings or in the alternative motion for summary judgement, and plaintiff's cross-motion for summary judgment.

After reviewing the extensive legal memoranda and hearing oral argument on these motions, this Court has determined that there are no material facts in dispute and that the case is ripe for decision.

I.

Pursuant to 50 U.S.C. § 832 all NSA employees must be eligible for a clearance for access to Sensitive Compartmented Information or SCI. NSA determined that plaintiff's access to SCI was no longer consistent with the national security and that finding mandated plaintiff's dismissal from the agency. In reaching the decision to terminate his employment, the agency provided plaintiff with notice of the reasons for the proposed action. Plaintiff was also provided with the opportunity to make written and oral presentations to the agency prior to his termination.

Plaintiff challenges his termination on both statutory and constitutional grounds. With respect to his constitutional claims, plaintiff contends that the agency's decision violated his constitutional rights to privacy, due process and equal protection. Defendants contend that the Court cannot review these claims because plaintiff has no fifth amendment liberty or property interest, and that the Constitution provides no special protection for homosexuals. Plaintiff's statutory claims are that the Director of NSA lacks the authority to terminate plaintiff under Pub. L. No. 86-36, National Security Agency Act of 1959, 50 U.S.C. § 402 *note* (West Supp. 1984), and that his termination should have taken place pursuant to separate statutory procedures applicable to removals necessary in the interests of national security, which are set forth in 5 U.S.C. § 7532. Defendants argued that the authority to terminate employment under 50 U.S.C. § 402 has been duly delegated to the Director of NSA, that terminating

plaintiff under § 402 was proper, and that the procedures established in 5 U.S.C. § 7532 are not mandatory.

II.

In considering plaintiff's claim that NSA's consideration of his homosexual conduct as a basis for withdrawing his access to SCI violates his rights of privacy and equal protection under the law, the Court is bound by *Dronenberg* v. *Zech,* 741 F.2d 1388 (D.C. Cir.), *rehearing en banc denied,* 746 F.2d 1579 (1984), in which this Circuit held that the Constitution provides no special protection for homosexuals. While defendants dispute that plaintiff's termination was based solely on his acknowledged homosexual conduct, this Court finds that even if the termination was premised solely on plaintiff's homosexuality, the agency's decision to withdraw plaintiff's access to SCI and thereafter terminate him is rationally related to a permissable purpose and, therefore, lawful.

The Court also finds that plaintiff's due process claims are without merit because plaintiff, as an employee excepted from the protections of the Civil Service Reform Act had no property interest in his job, and because the withdrawal of plaintiff's access to SCI and the resulting termination of employment, did not infringe any liberty interest.

Finally, in considering plaintiff's procedural due process claim, the Court notes that the NSA has established internal procedures applicable to termination decisions taken pursuant to Pub. L. No. 86-36. Those regulations are set forth in the NSA Personnel Management Manual at Chapter 370. The Court finds that the agency fully complied with its internal procedures by providing plaintiff with notice of the proposed adverse action, giving him a right to review the material upon which the termination was based, providing plaintiff and his attorneys with the opportunity to ma' written and oral presentations to the

agency, and providing him with written notice of the reasons for his termination.

Turning to plaintiff's statutory claims, this Court finds that the NSA Director was authorized to terminate plaintiff under Pub. L. No. 86-36, 50 U.S.C. § 402 *note*. In DoD Directive No. 5100.23, cited by the parties in their memoranda, the Secretary of Defense has delegated to the NSA Director his authority under Pub. L. No. 86-36 to terminate NSA employees. While the delegation of authority in DoD Directive No. 5100.23 refers to "establishment of positions" and "general administration of civilian personnel of the NSA", and not termination, the Supreme Court long ago established the general rule that the power of removal should be considered incident to the power of appointment which, in this case, was clearly delegated to the NSA Director. *In The Matter of Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). Finally, defendant could have instituted summary termination procedures under 50 U.S.C. § 833; but chose to proceed under the delegated authority which provided plaintiff greater procedural safeguards.

With respect to plaintiff's claim that his dismissal involved national security issues requiring the agency to utilize the procedures of 5 U.S.C. § 7532, the Court finds that use of § 7532 is not mandatory, and further finds that the agency acted properly in terminating plaintiff pursuant to Pub. L. No. 86-36.

III.

Accordingly, finding no material facts in dispute, defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied. An appropriate Judgment is filed herewith.

/s/ GEORGE H. REVERCOMB
George H. Revercomb, Judge

April 25, 1986
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1996

JOHN DOE, PLAINTIFF

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed Apr. 25, 1986]

JUDGMENT

This matter came before the Court on defendant's motion for judgment on the pleadings or in the alternative motion for summary judgment, and plaintiff's cross-motion for summary judgment. For the reasons stated in the Court's Memorandum of April 25, 1986, it is, by the Court this 25 day of April, 1986

ORDERED, ADJUDGED and DECREED that the motion for summary judgment of plaintiff John Doe is denied; and it is further

ORDERED, ADJUDGED and DECREED that the motion for summary judgment of defendants Casper Weinberger, Secretary, Department of Defense, and Lieutenant General William E. Odom, Director, National Security Agency, is granted; and it is further

ORDERED that each party shall bear its own costs.

/s/ GEORGE H. REVERCOMB
George H. Revercomb
United States District Judge

Dated:
April 25, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed June 9, 1987]

JUDGMENT

Before: WALD, Chief Judge, BORK and SILBERMAN, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed in part and vacated in part, and this case is remanded, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: June 9, 1987
Opinion for the Court filed by Chief Judge Wald.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

[Filed Aug. 18, 1987]

ORDER

Before: WALD, Chief Judge, BORK and SILBERMAN, Circuit Judges.

Upon consideration of appellees' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

[Filed Aug. 18, 1987]

ORDER

Before: WALD, Chief Judge, ROBINSON, MIKVA, EDWARDS, Ruth B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, Circuit Judges

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellees' suggestion is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX E

Statutes and Regulations Involved

1. Title 5, United States Code, provides in pertinent part:

§ 7312. Employment and clearance; individuals removed for national security

Removal under section 7532 of this title does not affect the right of an individual so removed to seek or accept employment in an agency of the United States other than the agency from which removed. However, the appointment of an individual so removed may be made only after the head of the agency concerned has consulted with the Office of Personnel Management. The Office, on written request of the head of the agency or the individual so removed, may determine whether the individual is eligible for employment in an agency other than the agency from which removed.

* * * * *

§ 7511. Definitions; application

(a) For the purpose of this subchapter –

(1) "employee" means –

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee –

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by –

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

§ 7512. Actions covered

This subchapter applies to –

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to –

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

(c) An employee suspended under subsection (a) of this section who—

(1) has a permanent or indefinite appointment;

(2) has completed his probationary or trial period; and

(3) is a citizen of the United States;

is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

2. The National Security Agency Act of 1959, 50 U.S.C. 402 note, provides in pertinent part:

"Sec. 2. The Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency. The rates of basic compensation for such positions shall be fixed by the Secretary of Defense (or his designee for the purpose) in relation to the rates of basic compensation contained in the General Schedule of the Classification Act of 1949, as amended [see 5 U.S.C. 5332], for positions subject to such Act which have corresponding levels of duties and responsibilities. Except as provided in subsections (f) and (g) of section 303 of the Federal Executive Salary Act of 1964, [see sections 5316 and 5317 of Title 5], no officer or employee of the National Security Agency shall be paid basic compensation at a rate in excess of the highest rate of basic compensation contained in such General Schedule. Not more than seventy such officers and employees shall be paid basic compensation at rates equal to rates of basic compensation contained in grades 16, 17, and 18 of such General Schedule.

"Sec. 4. The Secretary of Defense (or his designee for the purpose) is authorized to—

"(1) establish in the National Security Agency (A) professional engineering positions primarily concerned with research and development and (B) professional positions in the physical and natural sciences, medicine, and cryptology; and

"(2) fix the respective rates of pay of such positions at rates equal to rates of basic pay contained in grades 16, 17, and 18 of the General Schedule set forth in section 5332 of title 5, United States Code.

Officers and employees appointed to positions established under this section shall be in addition to the number of officers and employees appointed to positions under section 2 of this Act who may be paid at rates equal to rates of basic pay contained in grades 16, 17, and 18 of the General Schedule.

"Sec 5. Officers and employees of the National Security Agency who are citizens or nationals of the United States may be granted additional compensation, in accordance with regulations which shall be prescribed by the Secretary of Defense, not in excess of additional compensation authorized by section 207 of the Independent Offices Appropriation Act, 1949, as amended (5 U.S.C. 118h) [see 5 U.S.C. 5941], for employees whose rates of basic compensation are fixed by statue.

"Sec. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654) [repealed by Pub. L.

86-626, title I, § 101, July 12, 1960, 74 Stat. 427]) shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

"(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act.

* * * * *

3. The Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*, provides in pertinent part:

§ 831. Regulations for employment security

Subject to the provisions of this subchapter, the Secretary of Defense (hereafter in this subchapter referred to as the "Secretary") shall prescribe such regulations relating to continuing security procedures as he considers necessary to assure—

(1) that no person shall be employed in, or detailed or assigned to, the National Security Agency (hereafter in this subchapter referred to as the "Agency"), or continue to be so employed, detailed, or assigned; and

(2) that no person so employed, detailed, or assigned shall have access to any classified information;

unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

§ 832. Full field investigation and appraisal

(a) Conditional employment; other current security clearance; circumstances authorizing employment on temporary basis

No person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field

investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this subchapter; excepting that conditional employment without access to sensitive cryptologic information or material may be tendered any applicant, under such regulations as the Secretary may prescribe, pending the completion of such full field investigation: *And provided further,* That such full field investigation at the discretion of the Secretary need not be required in the case of persons assigned or detailed to the Agency who have a current security clearance for access to sensitive cryptologic information under equivalent standards of investigation and clearance. During any period of war declared by the Congress, or during any period when the Secretary determines that a national disaster exists, or in exceptional cases in which the Secretary (or his designee for such purpose) makes a determination in writing that his action is necessary or advisable in the national interest, he may authorize the employment of any person in, or the detail or assignment of any person to, the Agency, and may grant to any such person access to classified information, on a temporary basis, pending the completion of the full field investigation and the clearance for access to classified information required by this subsection, if the Secretary determines that such action is clearly consistent with the national security.

(b) Boards of appraisal; establishment; membership; appointment; appraisal in doubtful cases; report and recommendation; qualifications of members; Secretary's clearance contrary to board's recommendation

To assist the Secretary and the Director of the Agency in carrying out their personnel security responsibilities, one or more boards of appraisal of three members each, to be appointed by the Director of the Agency, shall be

established in the Agency. Such a board shall appraise the loyalty and suitability of persons for access to classified information, in those cases in which the Director of the Agency determines that there is a doubt whether their access to that information would be clearly consistent with the national security, and shall submit a report and recommendation on each such a case. However, appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law. Each member of such a board shall be specially qualified and trained for his duties as such a member, shall have been the subject of a full field investigation in connection with his appointment as such a member, and shall have been cleared by the Director for access to classified information at the time of his appointment as such a member. No person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment, detail, assignment, or access to classified information is in the national interest.

§ 833. Termination of employment

(a) Generally; finality

Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

(b) Employment in other departments or agencies

Termination of employment under this section shall not affect the right of the officer or employee involved to seek

or accept employment with any other department or agency of the United States if he is declared eligible for such employment by the Director of the Office of Personnel Management.

(c) Delegation of authority; limitation

Notwithstanding section 133(d) of title 10, only the Deputy Secretary of Defense and the Director of the National Security Agency may be delegated any authority vested in the Secretary of Defense by subsection (a) of this section.

§ 834. "Classified information" defined

For the purposes of this section, the term "classified information" means information which, for reasons of national security, is specifically designated by a United States Government agency for limited or restricted dissemination or distribution.

§ 835. Nonapplicability of administrative procedure provisions

Subchapter II of chapter 5, and chapter 7, of title 5, shall not apply to the use or exercise of any authority granted by this subchapter.

4. Chapter 370 of NSA Personnel Management Manual 30-2 (Aug. 12, 1980) provides in pertinent part:

SECTION 1

AUTHORITIES AND RESPONSIBILITIES

1-1. Introduction.—This chapter covers actions which furlough employees for 30 days or less or which remove, suspend, or reduce in grade or pay, for misconduct either on or off-the-job.

1-2. Authority of the Agency.—The authority to remove, suspend, furlough, or reduce an employee's grade or pay is inherent in the Agency's appointing authority. The agency may take actions covered in the chapter only for such cause as will promote the efficiency of the service. Authority to appoint has been delegated to the Director by the Secretary of Defense as provided in DoD Directive No. 5100.23, and has been appropriately redelegated by the Director.

1-3. Responsibilities of Supervisors.—Supervisors bear primary responsibility for employees' conduct on the job and for initiating necessary corrective action. Such action may include closer supervision, counselling, training, and oral or written reprimands (PMM Chapter 366, Personnel Conduct). When corrective action of this type fails or the conduct requires more severe action, it may be necessary to process a personnel action, such as suspension or removal. In that event, the supervisor is responsible for providing full and complete information on the situation to the Director of Civilian Personnel with a recommendation as to the action proposed. In this connection, supervisors will find that PMM Chapter 366A, Supervisor's Guide in Disciplinary Matters, provides adequate guidance in determining an appropriate penalty for the offense. Supervisors should not discuss with the employee a specific contemplated action. In no instance

may adverse actions of suspension, removal, furlough, or reduction in grade or pay as discussed herein be initiated without notification of the personnel representative assigned by the Office of Civilian Personnel.

1-4. Responsibility of the Director of Civilian Personnel.—The Director of Civilian Personnel has responsibility and authority for reviewing and effecting all personnel actions involving both on-the-job and off-the-job offenses. The Director of Civilian Personnel shall consider the facts, perform or request additional investigation required to make a sound judgment, propose an appropriate action to be taken, prepare the advance notice, and forward the total case file to the Deputy Director for Management Services (DDM) for decision. The Director of Civilian Personnel shall maintain privileged personnel information concerning adverse personnel actions covered by this chapter during an individual's tenure as an Agency employee and may provide such information only to authorized personnel. Upon an employee's separation from the Agency, personnel records will be disposed of in accordance with official records disposition schedules.

1-5. Responsibility for Final Decision.—Final decisions for proposed adverse personnel actions as discussed in this chapter shall be made by the DDM.

1-6. Responsibility for the Merit Systems Protection Board (MSPB):—The MSPB has statutory appellate jurisdiction over actions based on the following for veterans preference eligible employees:

a. removal;

b. suspension for more than 14 days;

c. reduction in grade or pay; or

d. furlough for 30 days or less for lack of funds or work or other nondisciplinary reasons.

* * * * *

SECTION 3

REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH OF 30 DAYS OR LESS

3-1. Coverage.

a. Actions Covered. – This section applies to:

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less.

b. Employees Covered. – Employees covered by this section include:

(1) an individual who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, and

(2) a veterans preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions.

3-2. Exclusions. – This section does not apply to:

a. a suspension or removal taken in the interest of national security;

b. a reduction-in-force action; or

c. a reduction in grade or removal for unacceptable performance.

3-3. Definitions. – For purposes of this section:

a. *Day* means calendar day.

b. *Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

c. *Grade* means a level of classification under the NSA/CSS position classification system.

d. *Pay* means the rate of basic pay fixed by law or administrative action for the position held by an employee, and

e. *Furlough* means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

3-4. Standard for Action. – The Agency may take an action covered by this section against an employee only for such cause as will promote the efficiency of the service.

3-5. Entitlements. – An employee against whom an action is proposed under this section is entitled to:

a. at least 30 days advance written notice of the proposed action, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

b. a reasonable time, but no less than 7 days, to answer orally, in writing or both, and to furnish affidavits and other documentary evidence in support of the answer;

c. be represented by an attorney or other representative; and

d. a written decision and the specific reasons therefor at the earliest practicable date.

3-6. Procedures.

a. Notice of Proposed Action. – The notice of proposed action shall inform the employee of his/her right to review the material which is relied on to support the reasons for action given in the notice. The notice of proposed action may include but is not limited to:

(1) Person or organization to whom employee's response is to be addressed;

(2) Date response is to be submitted by employee;
(3) Amount of official time authorized employee for preparation of response;
(4) Nature of the action; and
(5) Reasons for the action.

b. Disclosure of Material.—Material which cannot be disclosed to the employee, to his/her representative, or to his/her designated physician shall not be used to support the reasons in the notice.

c. Employee's Answer.

(1) The Agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he/she is otherwise in an active duty status.

(2) The Deputy Director for Management Services or his/her designated representative shall hear the employee's reply to a proposed adverse action.

d. Exceptions.

(1) The minimum 30 days advance written notice is not required when there is reasonable cause to believe the employee has commited a crime for which a sentence of imprisonment may be imposed.

(2) The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as, sudden breakdowns in equipment, acts of God, or emergencies requiring immediate curtailment of activities.

(3) An advance written notice is not required for a suspension during the notice period of a removal or for an indefinite suspension of more than 14 days when such is required for additional investigation or when circumstances are such that retention of the employee is [*sic*] an active duty status may be injurious to the employee, fellow workers, or the general public; may result in damage to

Government property; or may be detrimental to the interests of the Government. Reasons for not retaining an employee in an active duty status during the notice period shall be included in the notice of suspension. The Agency may require the employee to answer the proposed action and to furnish affidavits and other documentary evidence in support of the answer within such time frame as is reasonable under the circumstances, but not less than 7 days. When immediate action is required, the employee may be placed in a nonduty status with pay for such time, not to exceed 10 days, as is necessary to effect the suspension.

e. Representation.—An employee covered by this section is entitled to be represented by an attorney or other representative. The employee must designate the name of the representative in writing. The Agency may disallow as an employee's representative:

(1) an individual whose activities as a representative would cause a conflict of interest or position;

(2) an individual who cannot be released from official duties because of priority needs of the Government;

(3) an employee whose release would give rise to unreasonable costs to the Government; or

(4) any person who does not possess appropriate security clearance. (The Agency will not initiate security clearance action solely for the purpose of employee representation.)

3-7. Agency Decision.—In arriving at a written decision, the DDM shall consider only the reasons specified in the notice of proposed action and shall consider any reply of the employee or his/her representative. The Agency shall deliver the notice of decision to the employee at or before the time the action becomes effective. The notice shall inform the employee of his/her appeal rights.

3-8. Appeals.

a. Appeal Rights.

(1) A veterans preference eligible meeting the requirements of paragraph 3-1*b*(2) against whom an action is taken under this section is entitled to appeal an Agency decision to the Merit Systems Protection Board.

(2) Nonveterans preference eligible employees as discussed in paragraph 3-1*b*(1) of this section are not entitled to appeal an Agency decision to the MSPB.

b. Notice of Appeal Rights. – When a decision notice is issued to an employee on a matter appealable to the MSPB, the employee shall be provided:

(1) notice of the time limits (20 days) for appealing to the MSPB and the address of the appropriate Board office for filing the appeal;

(2) a copy of the Board's regulations;

(3) a copy of the appeal form (Form MSPB 20); and

(4) notice of any appealable rights to a grievance procedure.

3-9. Filing of Petitions for Appeal.

a. Instructions for filing of petitions for appeal are contained in MSPB instructions and shall be furnished to the employee in accordance with paragraph 3-8*a* above. Veterans preference eligible employees planning to appeal an Agency decision to the MSPB should carefully review and comply with paragraphs 1201.22 through 1201.24 of the MSPB instructions.

b. The Agency has 15 days from date of receipt of request from the appropriate MSPB Field Office to provide the case record in Federal employee appeals or the MSPB will decide cases without it.

3-10. Agency Records. – Copies of the following shall be maintained by the Agency and shall be furnished to the MSPB upon its request and to the employee affected upon the employee's request:

a. notice of proposed action;

b. the answer of the employee when written, or a summary thereof when made orally;

c. notice of decision and reasons therefor, and

d. any order effecting an action covered by this section, together with any supporting material.

3-11. Agency Representation. – The NSA/CSS General Counsel shall represent the Agency on all appeals before the MSPB.

APPENDIX F

Sensitive Compartmented Information:

Characteristics and Security Requirements

June 1984

Preface

This paper on the nature of sensitive Compartmented Information (SCI) and pertinent security controls was originally produced at the CONFIDENTIAL level in March 1984. It was intended for background use by legislative liasion officers responding to Congressional inquiries about SCI security requirements. It has been redrafted for issuance as an unclassified text because SCI security recently has become a matter of interest to all three branches of Government. The concept of providing special systems of compartmented protection to entire programs of intelligence collection and production is not widely known or understood. This paper is intended to assist those who must officially consider various aspects of SCI without the benefit of extensive experience with these programs.

In the continuing discussions of the appropriate security measures for protecting Sensitive Compartmented Information (SCI), including polygraph examinations and nondisclosure agreements, there has been little or no attention to what SCI is. These discussions raise issues about SCI which include:

> Does the nature of SCI lend itself to varying levels and kinds of security protection? Is the SCI accessed by "consumers" essentially different from the SCI dealt with by "producers"? Should some individuals be subject to stricter security screening for SCI access than others? Should the personnel of agencies not engaged in collecting or producing intelligence meet the same security standards for SCI access as those of intelligence agencies? Should political appointees be required to protect SCI from disclosure in the same manner as career federal employees? Are those who are granted access to SCI required to meet a higher standard of personnel security than those cleared for non-compartmented Confidential, Secret or Top Secret information? Is there a different assessment of acceptable risk in the SCI systems than for other classified information?

This report attempts to describe what SCI is, why it is sensitive, why the revelation of SC [*sic*] that an unwary individual might consider insignificant or trival can be damaging to an entire program for SCI collection, and why we should not be willing to accept any perceptible level of risk in decisions on personnel being granted access to SCI.

Sensitive Compartmented Information is data about sophisticated technical systems for collecting intelligence and the information collected by those systems. The characteristics of the systems that necessitated the development of SCI programs are (a) that compared to conventional intelligence activities employing human sources,

many more people normally must know sensitive information in order to develop, build, and operate the systems and to analyze the material they collect; (b) that they generally produce large quantities of accurate, detailed intelligence, which is needed and relied upon by senior planners and policymakers, and which, by its nature, is extremely fragile, in that it reveals the characteristics of the systems that collect it; and (c) that they are extremely vulnerable to adversary countermeasures, i.e., denial or deception.

Most people can easily understand the need for tight security in classic espionage operations employing live agents. The need for strong security is dictated by the need for source protection and, of course, it is clear that the apprehension of an agent results in the loss of valuable intelligence. The neutralization of a technical collection system is more akin to the loss of a whole agent network that to the loss of a single agent and the loss of such systems has severe consequences. These include the loss of valuable intelligence about "denied areas" which is not available by any other means; the cost of developing and producing new technical collection systems, which are extremely expensive, state-of-the-art programs; and the risks to the national security attendant to a lack of knowledge of what our adversaries are up to.

Communications intelligence, as defined by 18 U.S.C. 798, is the classic ex..nple of SCI, and normally is derived from intercepted communications. The unauthorized disclosure of such intelligence can reveal to the target country which of its messages are being intercepted and which ones are being read. If the targeted country takes the clearly indicated countermeasures, no further intelligence can be expected from that source and by that method. Similarly, the compromise of other technical collection systems, or intelligence derived from them, call tell our adversaries the capabilities of the systems and how to

take countermeasures. Even worse, once the target country's government knows what the systems collect and how it is collected, it has the option of conducting deception operations, i.e., providing misleading data which may result in defective U.S. foreign and defense policies.

To guard against these risks, SCI security control systems have been evolved in the years since World War II, when the Japanese and German crytographic systems were broken by the Allies, furnishing intelligence which was vital to victory over the Axis Powers. In structuring these systems, the lessons of Pearl Harbor have been borne in mind . . . the systems must permit timely dissemination of sensitive intelligence to those who need it to guide and carry out U.S. defense and foreign policy. Over the years, it has been demonstrated that the recipients' confidence in intelligence reporting has a direct relationship to the recipients' knowledge of the source or method producing it. Because of the amount of intelligence produced by the SCI systems and its broad utility, those with access to SCI number in the thousands.

The authority for SCI control systems is based upon the statutory responsibility of the Director of Central Intelligence (DCI), under the National Security Act of 1947, for the protection of intelligence sources and methods, and upon Executive Order 12356 which authorizes him to create special access programs for especially sensitive intelligence activities.

SCI systems, therefore, cover activities and information of extraordinary sensitivity and fragility from a security standpoint. They serve to restrict access to the protected information to persons who (a) have a clearly established official need for that information, and (b) who meet more rigorous and stringent personnel security criteria. Persons cleared for Confidential, Secret, or even Top Secret information are not automatically eligible by virtue of those clearances for access to SCI.

The personnel security criteria for access to all SCI are established by the DCI and are promulgated in Director of Central Intelligence Directive 1/14. Comparatively, the criteria for TS clearance require that denial be based upon a well-defined character or personality defect posing a threat to the national security. Because of the vulnerabilities and susceptibilities of SCI programs, special judgments must be made. In effect, no risk is tolerable where SCI is involved, and individuals who have been granted Top Secret clearances may be denied approval for access to SCI. Just as clearance for Top Secret does not automatically guarantee SCI access approval, the denial of SCI approval does not necessarily mean denial or revocation of TS clearance. This reflects the difference in the way SCI security is managed, and that it involves a higher order of security that non-SCI security.

SCI security control systems depend upon distinctive markings and restricted handling of material, stricter personnel security processing for access, and holding SCI material in "control centers" with physical and procedural barriers to preclude access by those who have not been formally approved. The SCI control systems provide an organized program for predetermining a generalized need-to-know regarding specific categories of intelligence and/or the sources and methods employed in their collection.

Everyone authorized access to SCI, regardless of that person's function, receives information that, if revealed to an unauthorized person, can compromise the system and reveal ways of countering it. Because the intelligence inherently is source-revealing, the reader of an SCI intelligence report is just as capable of revealing compromising data about a system as the builder or operator of the

system. Material collected by SCI systems which does not reveal the characteristics and vulnerabilities of the source is considered to be sanitized and is disseminated outside compartmented channels.

In accepting sensitive compartmented information, the recipient accepts the accompanying responsibilities and restrictions in a most explicit way. Each individual approved for access is indoctrinated on the extreme vulnerabilities of the collection systems, the risk to the systems of the unauthorized disclosure of the intelligence they collect, and the rules for safeguarding SCI. As a condition of access, the newly approved individual signs an agreement to abide by the security rules for SCI.

To summarize, the rationale for SCI control systems includes the following concepts:

- Sources and methods producing quantities of high quality intelligence, which are extremely vulnerable to countermeasures, require an extraordinary degree of security protection.
- Extraordinary protection can be afforded by restricting knowledge of these sources and methods and, where necessary, the intelligence they produce, to persons who have been subjected to especially thorough security screening, whose knowledge of such information is required for the performance of functions essential to the national security, and who have entered into an agreement requiring that they protect these sources and methods in the manner prescribed by the U.S. Government.
- Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, persons granted access to SCI must be determined by thorough investigation to be reliable and trustworthy. The objective of personnel security determinations for SCI access should be a risk-free population of approved individuals.

Therefore, a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used.

- Especially restricted channels are required for the transmission and use of data revealing the sensitive nature of these sources and methods, and of derived intelligence having the innate capability to compromise such data.
- Regardless of how carefully the security system is structured, the security of our secrets depends, in the final analysis, upon every person granted access. If any one of those entrusted with these secrets has vulnerabilities or susceptibilities which may be exploited, then our security can be breached. Every effort must be expended to avoid such an occurrence.

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